OA 1-7-82

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

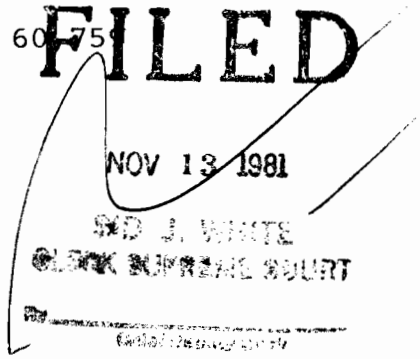
WILLIAM MARKHAM, etc., et al.)

Petitioners,)

vs.) NO. 60,75

E. G. FOGG, III, et al,)

Respondents.)



ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF ON THE MERITS OF W. R. DANIEL, JR., AMICUS CURIAE

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INTRODUCTION

This Brief is respectfully submitted by W. R. Daniel, Jr., Property Appraiser of Hillsborough County, Florida, Amicus Curiae in support of Petitioner, William Markham, pursuant to this Court's Order of November 10, 1981.

STATEMENT OF THE CASE AND FACTS

This case comes before the Court on Petition for Writ of Certiorari to review a decision of the Fourth District Court of Appeal in a civil action brought by Respondents seeking to obtain agricultural ad valorem classification for 270 acres of land in tax years 1974 and 1975.

W. R. Daniel, Jr., will rely upon the Statement of the Case and Facts as set forth in the Petitioner's Brief on the Merits.

ISSUE INVOLVED

WHETHER THE DETERMINATION OF PRIMARY BONA FIDE AGRICULTURAL USE UNDER §193.461, FLORIDA STATUTES IS CONTROLLED SOLELY BY VISIBLE PHYSICAL AGRICULTURAL USE OF THE LAND?

ARGUMENT

Classification and assessment of agricultural land is allowed by Article V, §4, Florida Constitution. This section is not self-executing but has been held to require legislative implementation. E.g., Bass v. General Development Corporation, 374 So.2d 479 (Fla. 1979). Agricultural assessment is an

exception to the general standard requiring that all property be assessed at its full just value. Thus, agricultural classification and assessment cannot be considered an absolute constitutional right. Bass v. General Development, supra; Walter v. Schuler, 176 So.2d 81 (Fla. 1965) In response to the permission granted by the Constitution, the Legislature has clearly stated in §193.461(3)(b), Florida Statutes, that it is only where the primary "use" is for bona fide agricultural purposes that land may be classified as agricultural.

This case presents the question of whether or not the primary bona fide use of the land is controlled solely by its physical use for some agricultural purpose. The only occasion upon which this Court has clearly considered the primary use issue in a similar context was Walden v. Borden, 236 So.2d 300 (Fla. 1970). The present decision of the Fourth District Court of Appeal constitutes a distinct departure from the principle and policy enunciated and recognized in Borden:

> We have concluded that the legislative classification of agricultural lands for tax purposes was intended to benefit the owner whose lands are dedicated to the named agricultural purposes 'exclusively' so used under old Section 193.201 and 'primarily' so used under new Section 193.461 whether such use is being made directly by the owner himself or indirectly through an agent or lessee; and that the Legislature did not intend to give preferential tax treatment to land such as that in the instant case that was obviously purchased for use in connection with the company's phosphate operations and is still being used for that purpose, even though it accommodates, also, an incidental use for agricultural purposes.
>
> [235 So.2d at 302].

In the present case, the Fourth District Court of Appeal has applied a static visible physical use test in apparent reliance upon Straughn v. Tuck, 354 So.2d 368 (Fla. 1978) and Roden v. K & K Land Management, Inc., 368 So.2d 588 (Fla. 1979). Had the Legislature intended that any agricultural use was to be the sole factor bearing on classification, the general statute would not have required that such use be the primary use.

It is respectfully submitted that the Property Appraiser, in determining primary use, and the Courts in passing upon such determination, must be guided by the spirit and intent of Florida's "Greenbelt" legislation which is designed to protect actual legitimate agricultural use of the land from the pressures of development and other non-agricultural uses. There was never any intention that agricultural classification be utilized by developers, speculators, mining interests, etc. as a "tax shelter" through agricultural "use" trappings which are ". . . 'servient, temporal and incidental' to the primary and dominant use of the property . . .". Walden, supra, at 301. See also Lauderdale v. Blake, 351 So.2d 742 (Fla. 3d D.C.A. 1977). In determining primary use of the land the Property Appraiser is required to discover and examine all available information pertinent to the ownership of the land and the use or uses to which the property is put or for which it is being held. If there is more than one use, the primary use must be discerned, whether the issue is initial classification or reclassification.

Under the statutory scheme of Chapter 193, Florida Statutes, the Property Appraiser must first determine the primary use being made of the property. If the primary use is non-agricultural, the land will be so classified and its just value will be determined by application of the factors stated within §193.011. If the primary use of the land is agricultural, the Property Appraiser may then utilize the criteria of §193.461(3)(b) to determine whether the agricultural use is bona fide. If the determination is that the land is not being used for bona fide agricultural purposes, the property is not subject to classification as agricultural. If the property does satisfy the primary and bona fide requirements, then the Property Appraiser must assess the property utilizing the factors stated in §193.461(6)(a).

In the present case, the Property Appraiser considered the contracts for sale, the re-zoning, administrative proceedings before various agencies, and engineering studies, all of which were necessary and essential and integral steps in of the development process. It defies intellectual honesty to argue that such "paper work" was not a use of the land. Ownership of the land is an essential prerequisite to such activities which are totally and completely incompatible with the incidental agricultural activity. These "paper" activities, although not a physical "use" of the land, are an essential part of an ongoing process of commercial development, and constituted clear and substantial evidence that the dominant and primary use of the property was non-agricultural.

In the present case, the Fourth District has substituted its judgment on a question of fact determined by the Trial Court in circumstances where the Fourth District recognized there were disputed facts for resolution. Such a retrial of facts in the Appellate Court was clearly improper. E.g., Greenwood v. Oates, 251 So.2d 665, 669 (Fla. 1971); Roden v. K & K Land Management, Inc., 368 So.2d 588, 589 (Fla. 1979).

The Fourth District's decision recognizes that the Final Judgment's conclusion that the property was not used for "bona fide agricultural purposes" is a finding upon independent factual determination not based solely upon either the sale statute or the rezoning statute. This is a correct observation, and such an independent factual determination is wholly proper under the statutory scheme. The statute does not mandate any single criterion; however, the result of the Fourth District's decision is to isolate criteria and factors in a vacuum, rather than considering all pertinent factors as a whole. The Fourth District's conclusion that because it found that the Trial Court improperly employed the sale and rezoning statutes, the Trial Court's independent factual conclusion as to a lack of good faith commercial agricultural use (which was based on all circumstances) must also fall is without logic and finds no justification in the wording of §193.461(b).

Section 193.461(b), states factors which may be taken into consideration, including any factor as may from time to time become applicable. This is a clear expression of

intention by the Legislature to allow the Property Appraiser flexibility in reaching determination as to whether primary bona fide agricultural use exists. It is a flexibility directed at recognizing substance rather than accepting window dressing and reality (economic or otherwise) rather than fiction. The Fourth District's decision does not hold that all factors considered together do not support the Property Appraiser's conclusion, or that any one of the various factors considered is irrelevant to a valid good faith determination of lack of primary bona fide agriculture use. In considering the Trial Court's ruling on the sale statute (§193.461(4) (c)) and the rezoning statute (§193.461(4)(a)3) in isolation, and jumping from its conclusion of error as to the application of those statutes to a conclusion of error in the independent determination of lack of primary bona fide use, the Fourth District confuses criteria which require reclassification with the Property Appraiser's ability and duty to independently determine primary bona fide agricultural purposes under the "good faith commercial agricultural use" standard of §193.461(3)(b) based on all relevant factors presented by each case.

The Fourth District's error primarily stems from a too restrictive reading of the decisions in Straughn v. Tuck, supra, and Roden v. K & K Land Management, Inc., supra. Tuck involved no other use other than agricultural use. Roden concerned a factual determination that the sale presumption had been overcome on that portion of the land still devoted to

substantial citrus production. As this Court in Bass v. General Development, supra at 482, intimates, some of the language in Tuck and Roden unfortunately is subject to a misconstruction requiring absolute subservience to any physical "use" as the basis for classification. This is not mandated by the Constitution. Clearly, the Legislature has not limited the term "use" only to actual physical uses of the land in independently determining its proper classification. Such a limitation would subvert the very purpose of agricultural classification and "Greenbelt" protection. Developers would be allowed a tax shelter at the expense of other taxpayers of the State of Florida by the expediency of short term use, or leases for "agricultural" pursuits having no factual or intellectually honest (economically or otherwise) relationship to primary bona fide agricultural pursuits.

If the Fourth District's decision is allowed to stand, rather than decreasing the pressure on Florida's Greenbelt areas,and legitimate farming interests, there will be an increase in such pressures. Interpretation of §193.461, cannot be divorced from the spirit and purpose underlying agricultural classification. While it must be recognized that there is no "black letter" standard which can be rigidly applied to separate primary bona fide agricultural pursuits from incidental non-bona fide agricultural facades in any and all cases, at the same time it must be recognized that there are certain inescapable factors and realities which cannot and must not be ignored.

Whether or not §193.461(4)(c) standing alone applies only to a completed sale of realty in order to raise a presumption that the property is not to be used in the future for bona fide agricultural purposes will be addressed by the Petitioner's Brief. Even assuming, as the Fourth District held, that the presumption requiring reclassification, which the taxpayer must rebut, is raised only by a sale actually passing title or possession, such a conclusion does not logically require that the Property Appraiser or the Courts disregard an equitable sale of property as a factor, together with other substantial activity (directly involving the land), which is related only to non-agricultural development use, in independently determining that the primary use of the land is non-agricultural or that the agricultural activity is not bona fide. This is especially true where the vendee or equitable owner, as here, has substantial rights of control over the land, regardless of the existence of legal title or possession.

The decision of the Fourth District is also erroneous in holding that the rezoning provision of §193.461(4)(a)3 can only be applied or utilized in situations where there has been a total and complete cessation of all agricultural use. As previously noted (supra, pp. 6-7, the Constitution does not mandate that the Legislature create a classification based solely upon physical activity or use on or of the land, a fact recognized in Bass v. General Development Corporation, supra. See, Rainey v. Nelson, 257 So.2d 538 (Fla. 1972). Thus, a continued agricultural activity after a rezoning allowing for

non-agricultural use is not the sole criterion of primary or bona fide use.

A construction of §193.461(4)(a)3 requiring cessation of all agricultural activity overlooks the fact that subsections (4)(a)1 & 2 separately and distinctly treat reclassification of land ". . . diverted from an agricultural to a non-agricultural use . . ." and which is ". . . no longer being utilized for agricultural purposes . . .". It is not to be assumed that the Legislature intended subsection (4)(a)3 to relate to the identical circumstances covered by subsections (4)(a)1 & 2. The Fourth District's construction which would render the subsection redundant (Lykes Brothers, Inc. v. City of Plant City, 354 So.2d 878, 881 (Fla. 1978)), again stems from that Court's slavish adherence to physical use as the sole criterion for classification, and its isolated elevation of incidental facades over the reality presented by all facts considered as a whole.

CONCLUSION

It is respectfully submitted that this Court should reverse the decision of the District Court Appeal, Fourth District, and remand the case for entry of an order affirming

the Final Judgment of the Trial Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Amicus Curiae has been furnished to Gaylord A. Wood, Jr., Esquire, 304 Southwest 12th Street, Ft. Lauderdale, Florida 33315; Alan S. Gold, Esquire, of Traurig, Askew, Hoffman, Lipoff, Quentel & Wolff, 1401 Brickell Avenue, PH-1, Miami, Florida 33131; William M. Barr, Esquire, P. O. Box 5725, Daytona Beach, Florida 32018; Harry A. Stewart, Esquire, 201 Southeast 6th Street, Ft. Lauderdale, Florida; and E. Wilson Crump, II, Assistant Attorney General, Department of Legal Affairs, Post Office 5557, Tallahassee, Florida 32304, by United States Mail, postage prepaid, this 12th day of November, 1981.

Original Signed By
TED R. MANRY, III
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